FILE COPY

No. 801

In the Supreme Court of the United States

OCTOBER TERM, 1960

BANKERS TRUST COMPANY, as Executor of the Will of HARRIET DELTA ELLIS, Deceased, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and other authorities involved	2
Statement	2
Argument	3
Conclusion	7
Appendix	8

CITATIONS

Cases:

Chase Nat. Bank v. *United States*, 278 U. S. 327	5, 6
Christiernin v. *Manning*, 138 F. Supp. 923	5
Collins v. *Commissioner*, 216 F. 2d 519	6
Edwards v. *Slocum*, 264 U.S. 61	6
Goodman v. *Granger*, 243 F. 2d 264, certiorari denied, 355 U. S. 835	5
Guggenheim v. *Rasquin*, 312 U.S. 254	5, 6
Helvering v. *Hallock*, 309 U.S. 106	5
Hoffman v. *Commissioner*, 2 T.C. 1160, affirmed *sub nom. Giannini* v. *Commissioner*, 148 F. 2d 285, certiorari denied, 326 U.S. 730	5
Matthews v. *Commissioner*, 3 T.C. 525	5
Tyler v. *United States*, 281 U.S. 497	5
United States v. *Manufacturers Nat. Bank*, 363 U.S. 194	5
United States Trust Co. v. *Helvering*, 307 U.S. 57	5

Statutes:

Internal Revenue Code of 1939:	
Sec. 810 (26 U.S.C. (1952 ed.) 810)	2, 3, 8
Sec. 811 (26 U.S.C. (1952 ed.) 811)	2, 8
Sec. 3657 (26 U.S.C. (1952 ed.) 3657)	8

Miscellaneous:

	Page
Rev. Rul. 156, 1953-2 Cum. Bull. 253	2, 4, 10
Treasury Regulations 105, Sec. 81.10 (26 C.F.R. 81.10)	2, 3, 9

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OPINIONS BELOW

The opinion of the district court (R. 29a-33a;[1] Pet. 14-17) is reported at 178 F. Supp. 267. The opinion of the court of appeals (Pet. 9-12) is reported at 284 F. 2d 537.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1960 (Pet. 13), and a petition for

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[1] Record references are to the Appendix to the appellant's brief in the court of appeals.

rehearing was denied on January 27, 1961 (Pet. 1). The petition for a writ of certiorari was filed on March 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly held that United States Treasury bonds owned by the decedent at the time of her death and which could have been applied at par by the executor in payment of the federal estate tax must be valued for federal estate tax purposes at their par value rather than at their lower market value at the date of death.

STATUTE AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of Sections 810, 811(a), and 3657 of the Internal Revenue Code of 1939; Section 81.10 of Treasury Regulations 105; and Revenue Ruling 156, 1953-2 Cum. Bull. 253, are set forth in the Appendix, *infra*, pp. 8-12.

STATEMENT

The undisputed facts may be summarized as follows:

The decedent died on April 23, 1953, leaving a gross estate valued in excess of $5,000,000 (R. 3a, 29a; Pet. 9). Included in the assets left by the decedent were United States Treasury bonds having a par value of $475,000 but a market value of $26,965.62 less than that amount on the date of her

death (R. 4a-5a, 30a; Pet. 9). All of these bonds could have been applied at par to payment of the federal estate tax, and two of them, each having a face value of $100,000, were actually so applied (R. 30a; Pet. 9).

The taxpayer-executor filed a timely estate tax return and included all of these bonds at their par value (R. 5a, 30a; Pet. 9). Thereafter, the taxpayer filed a timely claim for refund seeking to recover the amount of tax attributable to inclusion of the bonds at par instead of market value. The claim was disallowed and taxpayer brought this suit in the district court (R. 30a; Pet. 9). The district court held that the bonds should have been valued at market price, and accordingly granted the taxpayer's motion for summary judgment (R. 29a-35a). The court of appeals reversed (Pet. 9-13).

ARGUMENT

The decision of the court of appeals is clearly correct. It would be strange indeed if bonds that could be applied at par to payment of the federal estate tax should nevertheless be valued at a lower figure in computing the tax.

The federal estate tax is imposed upon the transfer of the net estate of the decedent (Section 810 of the 1939 Code, Appendix, *infra*, p. 8), and the gross estate is determined by including the value at the time of his death of all property of the decedent (Section 811(a) of the 1939 Code, Appendix, *infra*, p. 8). Treasury Regulations 105 (1939 Code), Sec-

tion 81.10 (Appendix, *infra*, pp. 9-10), provides that the value of property includible in the gross estate is the "fair market value" at the time of the decedent's death; that all "relevant facts and elements of value as of the applicable valuation date should be considered in every case"; and that where the value of any security determined on the basis of selling or bid and asked prices does not reflect its fair market value, then some "reasonable modification" should be made.

In the instant case, the court of appeals correctly applied the Regulations. It held that, while market quotations reflect to some extent the right to apply the bonds at par value in payment of estate taxes, such quotations obviously do not reflect the full value of the bonds to the estate of a particular holder whose death establishes the valuation date (Pet. 11). The decedent's death operated to transfer to her estate the right to obtain the full par value of the bonds by applying them in payment of the federal estate tax, and hence they should be valued at not less than par in computing the tax.

The decision of the court of appeals is consistent with a specific Treasury ruling. Rev. Rul. 156, 1953-2 Cum. Bull. 253 (Appendix, *infra*, pp. 10-12). This ruling is strongly supported by the well-established principle that the critical value is the value at the time of the decedent's death rather than before it.

United States v. *Manufacturers Nat. Bank*, 363 U.S. 194, 199; *Chase Nat. Bank* v. *United States*, 278 U.S. 327, 337; *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60; *Helvering* v. *Hallock*, 309 U.S. 106, 111; *Tyler* v. *United States*, 281 U.S. 497, 503; *Goodman* v. *Granger*, 243 F. 2d 264 (C.A. 3), certiorari denied, 355 U.S. 835; *Christiernin* v. *Manning*, 138 F. Supp. 923 (D. N.J.). Moreover, in *Guggenheim* v. *Rasquin*, 312 U.S. 254, 257, this Court stated that, in determining the value of a gift, "an important element in the value of the property is the use to which it may be put." The bonds were plainly worth par to the estate because of the use to which they might be put.

Contrary to the taxpayer's contention (Pet. 5), the instant decision is not inconsistent with such cases as *Matthews* v. *Commissioner*, 3 T.C. 525, and *Hoffman* v. *Commissioner*, 2 T.C. 1160, affirmed *sub nom. Giannini* v. *Commissioner*, 148 F. 2d 285 (C.A. 9), certiorari denied, 326 U.S. 730. Those cases stand for the proposition that property owned by the decedent at the time of his death must be included in his gross estate at its full value notwithstanding an option given by him to another person to purchase such property after the decedent's death for a lesser amount. The basis for the decisions is that, since the options were testamentary in character, the property must be given its fair market value at the time of the decedent's death. These holdings are fully consistent with our contention here that the full value of the bonds, measured by the use to which they could be put by the taxpayer, should be included in the

gross estate because that is the value which passed to others by reason of the decedent's death.

Collins v. *Commissioner*, 216 F. 2d 519 (C.A. 1), which is also cited by the taxpayer (Pet. 5), is similarly in accord with our position. In that case the court, following the reasoning of *Guggenheim* v. *Rasquin* (see *supra*, p. 5), held that the par value, rather than the lesser redemption price of a non-marketable Series G bond, should be included in the holder's estate, when the estate could redeem the bonds at par value within six months of decedent's death. As the court below (Pet. 11) expressly recognized, the *Collins* decision supports the government's position.

Taxpayer takes out of context (Pet. 6) an expression in *Edwards* v. *Slocum*, 264 U.S. 61, 63, to the effect that the estate tax reaches the interest of the decedent which ceased by reason of death. That is unquestionably so; but it is equally well settled that the estate tax also reaches the increment in value of property which arises by reason of the decedent's death as a result of expenditures made by the decedent. See *Chase Nat. Bank* v. *United States*, *supra*, 278 U.S. at 334-337. Here such an increment clearly arose by reason of the decedent's death and is properly includible in her estate.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1961.

APPENDIX

Internal Revenue Code of 1939:

SEC. 810. RATE OF TAX.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title.

* * * *

(26 U.S.C. (1952 ed.) 810)

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * *

(26 U.S.C. (1952 ed.) 811)

SEC. 3657. PAYMENT BY UNITED STATES NOTES AND CERTIFICATES OF INDEBTEDNESS.

Collectors may receive, at par with an adjustment for accrued interest, notes or certificates of indebtedness issued by the United States in payment of income, war profits, and excess profits taxes, and any other taxes payable other than

by stamp, during such time and under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe.

(26 U.S.C. (1952 ed.) 3657)

Treasury Regulations 105 (1939 Code) (26 C.F.R. 81.10):

Sec. 81.10 *Valuation of property*—(a) *General.* The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death; * * *. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The fair market value of a particular kind of property includible in the gross estate is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the applicable valuation date should be considered in every case.

* * * *

(c) *Stocks and bonds.* (1) The value of stocks and bonds, within the meaning of the Internal Revenue Code, is the fair market value per share or bond on the applicable valuation date.

* * * *

(3) In the case of stocks and bonds which are not listed upon an exchange, but are dealt in through brokers, or have a market, the fair market value shall be determined by taking the mean between the highest and lowest selling

prices as of the valuation date; or, if there were no sales on that date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the valuation date (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the valuation date, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the valuation date. * * *

* * * *

(6) If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors * * *.

(7) In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as provided in this paragraph does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value.

* * * *

Rev. Rul. 156, 1953-2 Cum. Bull. 253:

* * * *

Advice is requested as to valuation, for Federal estate tax purposes, of marketable United States Treasury bonds owned by a decedent which may be applied at par in payment of Federal estate taxes, and as to procedure for effecting such application of the bonds.

Various Treasury Department circulars provide that certain marketable (transferable and negotiable) and interest-bearing United States Treasury bonds, which upon the death of the owner constitute part of his gross estate, may be redeemed at the option of the duly constituted representatives of the deceased owner's estate at par value (fact, principal, amount), plus accrued interest to the date of payment, provided that the bonds were owned by the decedent at the time of his death and that the Secretary of the Treasury be authorized to apply the entire proceeds of redemption to the payment of Federal estate taxes. * * *

* * * *

Section 811 of the Internal Revenue Code provides that "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *," and the regulations (section 81.10(a) of Regulations 105) provide that "The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death; * * *." In the absence of any express provision to the contrary, it is clear that the includible "value," within the meaning of that term as used in the Code, is that which passes by virtue of the decedent's death and, hence, the words "at the time of his death" mean immediately upon, rather than before, death. * * * Since Treasury bonds passing by the death of the owner are, to the extent that they may be applied at par in payment of Federal estate tax liability, immediately upon his death redeemable at par value for that purpose, it follows that the par value thereof or their

mean quoted selling price at that time, whichever is higher, is their "value" or "fair market value" within the meaning of the statute and regulations. Section 81.10(c) of Regulations 105.

In view of the foregoing, it is held that to the extent marketable United States Treasury bonds owned by a decedent at death may be applied at par in payment of Federal estate taxes the par value thereof or the mean between their highest and lowest quoted selling price at the time of his death (and accrued interest to the date of death), whichever is higher, constitutes the value at which such bonds are includible in his gross estate for Federal estate tax purposes.

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